Public Prosecutor v Natu ak Suhai

HIGH COURT (KUCHING) — CRIMINAL REVISION NO 43–24 OF 2007-III(I)
DAVID WONG J
9 MAY 2008

Criminal Law — Penal Code — s 409 — Criminal breach of trust — Ingredients of offence — Whether ingredients proven by prosecution — Whether defence raised any reasonable doubts

Criminal Procedure — Accused — Defence — Conduct of — Failure to put forth case on cross-examination of prosecution witnesses — Effect of such failure upon defence

Criminal Procedure — Appeal — Conviction and sentence, against — Delay not occasioned by accused in disposing off appeal — Consideration of effects of delay upon accused — Whether mental anguish caused to accused — Whether sentences ought to reflect the effects of delay

The accused was convicted in the sessions' court on three charges of criminal breach of trust ('CBT') under s 409 of the Penal Code. He was sentenced to one year's imprisonment on each charge, sentences to run concurrently. The accused appealed against conviction and sentence. Stay of execution of the sentences was granted pending the disposal of appeal. However, the petition of appeal was never filed due to the fact that the sessions' court judge never delivered the grounds of decision. The judge had since left the judicial and legal service. The High Court thus treated the appeal as a revision.

Held, confirming the conviction but reducing the terms of imprisonment:

(1) The ingredients for criminal breach of trust under s 409 of the Penal Code are as follows: (i) the accused was a public servant at the material time of the offence; (ii) the accused was in such capacity entrusted with the property in question or with control over it; and (iii) the accused committed criminal breach of trust in respect of the property. Having examined the evidence tendered by the prosecution, there was no doubt that the requisite ingredients had been proven at the end of the prosecution case. The accused was rightly called to enter his defence (see paras 7–8).

(2) The defence of the accused consisted of mere allegations. The allegations were against the weight of evidence produced and also unreasonable. The accused also failed to put forth his case in cross-examination of the prosecution witnesses. It is trite law that the accused must put forth his case during cross-examination. If the accused does not do so, the court may conclude that the accused does not have any defence (see paras 9–10).

(3) The High Court would reduce the sentences of imprisonment to eight months on the ground that the accused had suffered mental anguish due to the long delay in which the appeal was disposed of. This delay was not the doing of the accused and ought to be taken into account in reviewing the appeal (see para 11).

[Bahasa Malaysia summary

Tertuduh telah disabitkan di mahkamah sesyen atas tiga pertuduhan jenayah pecah amanah ('JPA') di bawah s 409 Kanun Keseksaan. Dia telah dihukum pernjara setahun untuk setiap pertuduhan, hukuman-hukuman dijalankan serentak. Tertuduh telah merayu terhadap sabitan dan hukuman. Penggantungan pelaksanaan hukuman-hukuman tersebut telah diberikan sementara menunggu rayuan selesai. Walau bagaimanapun, petisyen untuk rayuan itu tidak pernah difailkan kerana hakim mahkamah sesyen tidak menyampaikan alasan-alasan keputusan. Hakim tersebut telahpun meninggalkan perkhidmatan kehakiman dan undang-undang. Mahkamah Tinggi oleh itu menganggap rayuan tersebut sebagai penyemakan.

Diputuskan, mengesahkan sabitan tetapi mengurangkan tempoh pemenjaraan:

(1) Ramuan-ramuan dalam jenayah pecah amanah di bawah s 409 Kanun Keseksaan adalah seperti berikut: (i) tertuduh adalah pengkhidmat awam pada masa matan kesalahan; (ii) tertuduh adalah dalam kapasiti yang mana diamanahkan dengan harta yang dipersoalkan atau mempunyai kawalan ke atasnya; dan (iii) tertuduh telah melakukan jenayah pecah amanah berkaitan harta itu. Setelah meneliti keterangan yang dikemukakan oleh pihak pendakwaan, tiada keraguan bahawa ramuan-ramuan yang diperlukan telahpun dibuktikan di akhir kes pendakwaan. Tertuduh telah dipanggil dengan betul untuk memasukkan pembelaannya (lihat perenggan 7–8).

(2) Pembelaan tertuduh mengandungi pengataan semata-mata. Pengataan-pengataan tersebut adalah terhadap beban keterangan yang dikemukakan dan juga tidak munasabah. Adalah undang-undang tetap bahawa tertuduh hendaklah mengemukakan kesnya semasa

pemeriksaan balas. Jika tertuduh tidak berbuat demikian, mahkamh boleh memutuskan bahawa tertuduh tidak mempunyai apa-apa pembelaan (lihat perenggan 9–10).

(3) Mahkamah Tinggi akan mengurangkan hukuman penjara kepada lapan bulan atas alasan bahawa tertuduh mengalami kesengsaraan mental akibat daripada kelewatan menyelesaikan rayuan itu. Kelewatan ini bukan kerana tertuduh dan patut diambil kira semasa menyemak rayuan itu (lihat perenggan 11).]

Notes

For cases on appeal against conviction and sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 262–295.

For cases on defence of accused generally, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 18–74.

For cases on s 409 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1854–1880.

Cases referred to

Mohamad Syaifuddin Ahmad Yassin v PP [2007] 9 CLJ Supp 120 (refd)

Mohd Abbas bin Danus Bakan v PP [2006] 5 MLJ 332 (refd)

Legislation referred to

Penal Code s 409

Steve Ritikos (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Detta Samen (Detta Samen & Co) for the accused.

David Wong J:

[1] On 6 May 2008, I dismissed the appeal of the respondent and now give my reasons for my decision.

APPEAL

[2] This was actually an appeal from the respondent/accused ('accused') against the decision of the learned sessions court judge who had on the 29 June 1992 found the accused guilty and convicted him of three charges of criminal breach of trust under s 409 of the Penal Code and imposed a one year sentence for each charge which was to run concurrently.

BACKGROUND

[3] The three charges against the accused read as follows:

1st charge:

That you on or about the 18th July, 1988 at Pejabat Pos Bergerak No. 7, Kem Semanggo, Kuching, in the State of Sarawak, being a servant in the employment of the Government of Malaysia, namely, as Ketua Pos, Pejabat Pos Bergerak No. 7 (T.P.O.7) and in such capacity entrusted with a certain property, to wit, a sum of Four Hundred Dollars (RM400.00), being the Bank Simpanan Nasional deposit money which you had collected from one Rohana bt Zakaria (f) committed criminal breach trust in respect of the said sum of money and you thereby committed an offence punishable under section 409 of the Penal Code.

2nd charge:

That you on or about the 31st October, 1988 at Pejabat Pos Bergerak No. 7, Kem Semanggo, Kuching, in the State of Sarawak, being a servant in the employment of the Government of Malaysia, namely, as Ketua Pos, Pejabat Pos Bergerak No. 7 (T.P.O.7) and in such capacity entrusted with a certain property, to wit, a sum of Four Hundred Dollars (RM400.00), being the Bank Simpanan Nasional deposit money which you had collected from one Abdul Latif B. Abas (m) committed criminal breach trust in respect of the said sum of money and you thereby committed an offence punishable under section 409 of the Penal Code.

3rd charge:

That you on or about the 19th December, 1988 at Pejabat Pos Bergerak No. 7, Kem Semanggo, Kuching, in the State of Sarawak, being a servant in the employment of the Government of Malaysia, namely, as Ketua Pos, Pejabat Pos Bergerak No 7 (T.P.O.7) and in such capacity entrusted with a certain property, to wit, a sum of Two Hundred Dollars (RM200.00), being the Bank Simpanan Nasional deposit money which you had collected from one Hamadiah Bt Bidin (f) committed criminal breach trust in respect of the said sum of money and you thereby committed an offence punishable under section 409 of the Penal Code.

[4] Stay of execution of the sentences imposed by the sessions court judge was granted pending the disposal of appeal. Unfortunately the petition of appeal was never filed due the fact that the sessions court judge never delivered his grounds of decision and no grounds will be forthcoming as he is no longer in the legal service.

[5] I was faced with a similar circumstance in the case of *Mohamad Syaifuddin Ahmad Yassin v Public Prosecutor* [2007] 9 CLJ Supp 120 and I treated that appeal by way of revision and this was how I approached it:

Revision

In dealing with this appeal by way of revision, I ask myself the question how I should approach this revision. Ian HC Chin J in the just quoted case said that he was not allowed 'at this stage of the proceedings to make any finding of facts and much will depend on what crucial findings had been made by the judge'. Starting on that premise he then went on to set out the defence of the accused/appellant and then at p 548 concluded as follows:

> 'It was opened to the judge to reject those evidence of the defence but with sufficient reason. Unfortunately, though the defence was disbelieved, no reasons were given. Those few statements of the judge, above, which he made in his ruling do not make for a 'speaking judgment' and there are no grounds of decision.
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> As for the second charge, there is no evidence led as to how that black plastic bag came to be in the part of the house where it was found. Since the house can be accessed by so many people, possession by the accused must be established and there is no evidence of that. In view of the accused's denial of any knowledge of it, the judge will have to say why he did not believe the accused and why the defence has not created any reasonable doubt on the case of the prosecution. This has not been done. In the end I am left with the conclusion that the conviction is not safe.'
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> If one takes the learned judge's approach to its natural conclusion, all appeals under such circumstances would be allowed as there invariably would be no 'speaking judgment'.
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> With respect I disagree with that approach. It is my view that the court has a duty to look at the cold printed evidences without the benefit of the sessions court judge's observation of the demeanors of the witnesses and then ask itself the question whether the decision of the sessions court judge can be supported by the evidences adduced in the court below by drawing whatever inferences possible.
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> (Emphasis added.)

[6] I will, in this appeal, adopt the same approach.

SECTION 409 OF THE PENAL CODE

[7] The ingredients for criminal breach of trust are as follows:

(i) that the accused was a public servant at the material time of the offence;

(ii) that the accused was in such capacity entrusted with the property in question or with control over it;

(iii) that the accused committed criminal breach of trust in respect of it.

[8] Having examined the evidence tendered by the prosecution, I had no doubt in my mind that the above ingredients had been proven at the end of the prosecution case which required the accused to enter his defence. My view was based on the following evidence:

(i) In respect of the first ingredient, the evidence from PW1 who was the then Acting Assistant Director of Posts (Administrative Section), Postal Department, Kuching, Sarawak confirmed that the accused was a staff of the department. This evidence was never contradicted.

(ii) As for the second ingredient, the evidence of PW15 who was the Ketua Pos, General Post Office, Kuching confirmed that the accused was in charge of Mobile Post Office No 7. Again there was no evidence which disputed that.

(iii) As for the third ingredient, all the three victims named in the charges had testified in court confirming that it was the accused who had received the monies from them. This evidence was never challenged by the accused; in fact he admitted that he had received the monies from the three victims. There was also evidence from PW18 and PW12 who were from respective BSN Headquarters confirming that the monies were never credited to the respective victim's accounts. On this I agree with the prosecuting officer's submission that the natural inference was that it was the accused, on each of the three occasions, who had misappropriated the monies set out in the charges. He was correct to rely on *Ratanlal's Law of Crime* (22nd Ed, 1971), where the author at p 1085 stated as follows:

> Distinct proof of criminal misappropriation is necessary. But it does not lie on the prosecution to prove the actual mode of misappropriation. Where it is proved by the prosecution that the money was returned by the accused which he was bound to do, it lies on the accused to prove his defence. Proof as to the precise manner in which the accused has dealt with the money is not necessary.

That being the case, the accused was rightly called to enter his defence.

[9] In his defence, the accused alleged that his signatures on the three Laporan Wang Masuk were forged by PW11 and it was PW11 who had committed criminal breach of trust. This allegation, in my view, was only a mere allegation. One reason for saying that was that PW11 was never cross examined on that allegation. It is trite law that the accused must put forth his case during cross-examination and if he did not the court can only conclude that he may not have any defence. To further emphasise on this point, I can no better than quote what Gopal Sri Ram JCA said in *Mohd Abbas bin Danus Bakan v Public Prosecutor* [2006] 5 MLJ 332, at p 338:

> In so far as the appreciation of the appellant's unsworn statement is concerned, we have already discussed earlier the way in which such statements are to be treated as a matter of law. So far as factual treatment is concerned, it is clear from the judgment under appeal that the learned commissioner went through all the points made in the unsworn statement and found them to be wanting. *Some of the matters raised in the unsworn statement were never put to prosecution witnesses*. That, of course, will have the effect of diminishing the probative value that is to be attached to the unsworn statement.
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> (Emphasis added.)

[10] In any event the allegation was against the weight of evidence produced in court and also not a reasonable one.

[11] For the reasons stated above, I confirmed the conviction of the sessions court judge. As for the sentence of one year imprisonment, I had reduced it to eight months on the ground that the accused had suffered mental anguish by virtue of the long delay in which this appeal was disposed of. This delay was not the doing of the accused and in my view ought to be taken into account in reviewing this appeal.

Conviction confirmed but terms of imprisonment reduced.

Reported by Andrew Christopher Simon